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No. 09-980

In the Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Int'l Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987) 17
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115 Cong. Rec. 5875 (1969) 23
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115 Cong. Rec. 9951 (1969) 22
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115 Cong. Rec. 31,914 (1969) 22
115 Cong. Rec. 32,347 (1969) 22
116 Cong. Rec. 819 (1970) 23
116 Cong. Rec. 18,913 (1970) 23
116 Cong. Rec. 35,295 (1970) 22
116 Cong. Rec. 35,296 (1970) 23
134 Cong. Rec. 22,374 (1988) 23
H.R. 2983, 100th Cong. (1987) 23
H.R. 12915, 91st Cong. (1970) 22
H.R. 19340, 91st Cong. (1970) 22
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S.1, 94th Cong., 1st Sess. (1975) 24
S.1523, 100th Cong. (1987) 23
S. Rep. No. 91-617 (1969) 4, 23

Areeda, Phillip E. & Herbert Hovenkamp, *Antitrust Law* (3d ed. 2006) 16
The Antitrust Model of Extraterritorial Trademark Jurisdiction: Analysis and Predictions After F. Hoffman-La Roche, 20 Emory Int'l L. Rev. 651 (2006) 13, 16

Miscellaneous—Continued: Page

Dresnick, Jordan A, Kimberly A. Piro & Israel J. Encinosa, *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. Miami Inter-Am. L. Rev. 453 (2009) 12

Elhauge, Einer, *Statutory Default Rules: How to Interpret Unclear Legislation* (2008) 21

Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321 (1989) ... 8

Goldsmith, Michael & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET,"* 73 Minn. L. Rev. 1023 (1989) 23

Griffin, Joseph P., *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159 (1999) 18

Huffman, Max, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Hous. L. Rev. 285 (2007) 11

National Commission on Reform of the Federal Criminal Laws, *Final Report* (1971) 24

Parrish, Austen, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455 (2008) 16

Podgor, Ellen S., *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 McGeorge L. Rev. 83 (2006) 16

Miscellaneous—Continued: Page

Podgor, Ellen S. & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 San Diego L. Rev. 585 (2007) 7, 8

Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction, 98 Harv. L. Rev. 1310 (1985)..... 18, 19

President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (1967)..... 21-22

Turley, Jonathan, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598 (1990)..... 16

W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 Fordham L. Rev. 213 (2005)..... 13-14

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae International Association of Defense Counsel ("IADC") is an organization of

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties received timely notice and consented to this filing.

corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. Since 1920, the IADC has been dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC regularly files briefs in pending cases throughout the United States on a variety of civil justice issues of broad application. Because the decision below erroneously sweeps a vast amount of foreign conduct within the jurisdiction of U.S. courts, and will subject legitimate foreign businesses to invasive discovery, wasteful litigation, and treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), IADC has a strong interest in its prompt review and reversal.

SUMMARY OF ARGUMENT

This case implicates several facets of extraterritoriality law that have caused significant confusion in the lower courts. Review by this Court thus would provide critical guidance on important and recurring issues that are of growing importance in an increasingly globalized world economy. The decision of the court below that the regulation of foreign conduct affecting the United States does not implicate the presumption against extraterritoriality conflicts with several decisions of this Court, which have made clear the presumption applies even when foreign conduct has domestic effects. Review also would permit the Court to resolve an acknowledged conflict in the lower courts over the meaning of this Court's decision in *United States v. Bowman*, 260 U.S. 94 (1922), a case involving prosecution of crimes on the high seas against the *United States government*,

which courts—including in cases involving RICO's extraterritorial reach—have widely misinterpreted to permit extraterritorial actions for harms done to private parties. It would also provide an opportunity to address questions that have been raised about whether boilerplate statutory references to "interstate or foreign commerce" suffice to overcome the presumption against extraterritoriality.

Long experience with the "effects" test in antitrust, trademark, and securities law, as well as in applying RICO itself, confirms it is inherently indeterminate, unpredictable, and fact-intensive, making it a deeply flawed means for determining the extraterritorial application of a statute as expansive as RICO. As this Court has recognized, such indeterminate tests promote wasteful litigation and create uncertainty that deters legitimate foreign businesses from engaging in activities that could subject them to suit here, thus inhibiting commerce.

A straightforward application of this Court's precedents clearly indicates that RICO does not apply extraterritorially. The statute is silent about extraterritorial application and some of its enforcement provisions affirmatively limit RICO to domestic use. The absence of even rudimentary provisions to accommodate RICO's application abroad confirms that Congress did not intend it to apply extraterritorially, and underscores the importance of requiring a clear indication Congress wishes a statute to be applied abroad, to ensure it has made the necessary legislative determinations to address potential conflicts with foreign nations. Such sensitive foreign-relations judgments should be made by Congress,

not by courts on an ad hoc basis. Finally, RICO's legislative history confirms that Congress intended it to address "the nationwide nature of the activity of organized crime." S. Rep. No. 91-617, at 161 (1969).

ARGUMENT

A. Review In This Case Would Permit The Court To Clarify Significant Areas Of Confusion In Extraterritoriality Law

There is significant confusion among the federal courts on the extraterritorial application of U.S. law. Because this case implicates several of the principal areas of confusion, it provides an excellent vehicle for furnishing the lower courts with sorely needed guidance on important and recurring questions in an area of the law that is of growing importance in an increasingly globalized world economy.

1. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)). While "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States," whether it "has in fact exercised that authority * * * is a matter of statutory construction." *Id.* The D.C. Circuit's decision below drastically departed from that basic understanding, concluding that "[b]ecause conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting th[e] 'effects' test is '*not* an *extraterritorial*

assertion of jurisdiction.'" App. 58 (quoting *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984)). Thus, the court held, "*the presumption against extraterritoriality does not apply.*" *Id.* (emphasis added). Review is warranted to correct that fundamental misunderstanding.

This Court has frequently noted that a jurisdiction may regulate conduct outside of its borders that has effects within it, but its decisions make clear that the presence of domestic effects does not eliminate the need for applying the presumption against extraterritoriality. In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), for example, this Court held that the Lanham Act authorized relief for an American corporation against acts of trademark infringement by a U.S. citizen in Mexico. The Court began by reaffirming that "legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears," *id.* at 285, and that the determination whether Congress had "project[ed] the impact of its laws beyond the territorial boundaries of the United States * * * depends on construction" of the statute. *Id.* at 282-83. The Court then analyzed the statutory text and concluded that the infringing activities "fall within the jurisdictional scope of the Lanham Act." *Id.* at 283-85. Finally, the Court separately addressed the domestic effects of foreign conduct in rejecting the argument that relief would violate the holding of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), that "a violation of American law could not be grounded on a foreign nation's sovereign acts." That case was not implicated, the Court ex-

plained, because the defendant's "'own deliberate acts, here and elsewhere, . . . brought about forbidden results in the United States.'" 344 U.S. at 288 (quoting *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927)). The Court's analysis makes plain that the presence of domestic effects did not relieve it of the obligation of first ensuring Congress had authorized the statute to be applied extraterritorially, and that granting relief against the defendant's foreign conduct was deemed "extraterritorial" despite its domestic effects. *Accord Sisal Sales*, 274 U.S. at 274-75 & n.*, 276.

2. Review in this case also would permit the Court to address an acknowledged conflict in the lower courts over the meaning of this Court's decision in *United States v. Bowman*, 260 U.S. 94 (1922). There, the Court held that the crime of conspiring to defraud a government-owned corporation (by overbilling it for ship fuel) applied to conduct on the high seas, notwithstanding the usual presumption against extraterritoriality. The Court explained:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. * * *

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to *defend itself* against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.

Id. at 98 (emphasis added).

The lower courts are divided on the meaning of *Bowman*. *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 San Diego L. Rev. 585, 590-94 (2007). Some have interpreted *Bowman*'s limited exception to hold broadly that even "[a]bsent an express intention on the face of the statutes," Congress's intent to apply a statute extraterritorially "may be inferred from the nature of the offense[]," *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980), regardless of whether the crime is directed against the government itself. "On authority of *Bowman*, courts * * * have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm." *United States v. Plummer*, 221 F.3d 1298, 1304-05 (11th Cir. 2000). This division of authority is *directly implicated* here: The influential decision in *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd on other grounds*, 117 F.3d 1206 (11th Cir. 1997), held in reliance on *Bowman*, *id.* at 1515, that Congress *implicitly* authorized RICO's worldwide application in light of the breadth of its prohibitions, *id.* at 1516-17: "As long as the

racketeering activities produce effects or are intended to produce effects in this country, RICO applies." *Id.* at 1517.[2]

Other courts have explicitly "disagree[d]" with that line of cases, recognizing that "*Bowman* was clearly cast in reference to the 'class' of criminal statutes" against the government, and "is not a free standing principle of statutory construction" applicable outside that limited context. *United States v. Martinelli*, 62 M.J. 52, 58 (C.A.A.F. 2005); *accord United States v. Gatlin*, 216 F.3d 207, 211 n.5 (2d Cir. 2000) (Cabranes, J.); *United States v. Gladue*, 4 M.J. 1, 4-5 (C.M.A. 1977).[3] Scholars also have criticized that line of cases for "dramatically chang[ing] the meaning of [*Bowman*]." *Rediscovering* Bowman, 44 San Diego L. Rev. at 592. Review in this case would present an opportunity to restore a proper understanding of *Bowman*.

3. Finally, review in this case would permit the Court to address whether general statutory refer-

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[2] As petitioner notes (Pet. 21 & n.9), *Noriega* largely relied on language in 18 U.S.C. § 1962(c) and (d) prohibiting certain conduct by "*any* person associated with *any* enterprise," which the court characterized as "all-inclusive" language which "do[es] not suggest parochial application." 746 F. Supp. at 1516. But this Court long ago rejected that argument. *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) (although statute applied to "any person or persons," words "broad enough to comprehend every human being," presuming Congress did not mean it to apply to foreign citizens on the high seas).

[3] In another context, the government has affirmed this narrow understanding of *Bowman*. *See Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. 321, 330 (1989).

ences to "foreign commerce" suffice to overcome the presumption against extraterritoriality. RICO prohibits specified conduct in connection with an "enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce," 18 U.S.C. § 1962(a)-(c). This Court has "repeatedly held that even statutes that contain broad language * * * that expressly refer to '*foreign* commerce' do not apply abroad." *Aramco*, 499 U.S. at 251 (citing *New York Cent. R.R. v. Chisholm*, 268 U.S. 29 (1925); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). Under those precedents, such "boilerplate language which can be found in any number of congressional Acts" falls far short of what is necessary to overcome the presumption against extraterritoriality. *Aramco*, 499 U.S. at 251. But a recent decision of this Court may raise questions about that settled law. There is language in *Pasquantino v. United States*, 544 U.S. 349 (2005), that a statute that "punishes frauds executed 'in interstate or foreign commerce,' * * * is surely not [one] in which Congress had only domestic concerns in mind." *Id.* at 371-72 (internal quotations and citations omitted). While that statement is plainly *dicta*—the opinion emphasizes that only domestic conduct was at issue, *id.* at 371—it has raised questions about whether boilerplate references to foreign commerce suffice to overcome the presumption against extraterritoriality.

B. The "Effects" Test Provides Scant Guidance For Courts And Legitimate Businesses And Encourages Wasteful Litigation

"[C]ourts have divided over th[e] issue" of "whether RICO applies extraterritorially at all." *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351 (11th Cir. 2008). But even among those courts that, like the court below, use the "effects" test to determine the extraterritorial application of RICO, there is such disagreement and confusion about its operation that it provides little guidance to courts and legitimate businesses. Moreover, long experience in other fields in which the test has been used—securities, antitrust, and trademark law—demonstrates the test is so inherently indeterminate, fact-intensive, and unpredictable in application that it is a deeply flawed means for determining the extraterritorial application of a statute as expansive as RICO.

1. Decades of experience using the "effects" test in various contexts reveal persistent confusion about the magnitude and directness of the effects required to warrant extraterritorial application, yielding unpredictable and inconsistent outcomes.

Antitrust. Between the 1940s and the 1970s, most courts applied variations of the test established in *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), which concluded that the Sherman Act applies extraterritorially if an anticompetitive agreement has an intended effect on imports. *Id.* at 443-44. "The already confused effects test [became] even more imprecise following the Ninth Circuit's decision in *Timberlane*

Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976)." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 n.12 (5th Cir. 2001) ("*Statoil*"). *Timberlane* adopted a "jurisdictional rule of reason," comprised of a relaxed formulation of the "effects" test (whether the challenged conduct had "some effect actual or intended," 549 F.2d at 613-14), and consideration of comity interests.

Because "courts differ[ed] in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists," H.R. Rep. No. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487, Congress adopted a statutory "effects" test in 1982's Foreign Trade Antitrust Improvements Act ("FTAIA"), under which the Sherman Act applies to foreign conduct that "has a direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a.

But far from clarifying the "effects" test, section 6a "introduced confusion" to "an area of the law that was already 'confused and unsettled.'" Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Hous. L. Rev. 285, 286-98 (2007) (quoting *Statoil*, 241 F.3d at 423-24)). Several courts—including this Court—have found section 6a "unclear" and have, on occasion, relied instead on its common-law predecessors. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993) (principally applying the *Alcoa* test); *accord United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (declining to "rest * * * upon the FTAIA"); *Metro Indus., Inc. v.*

Sammi Corp., 82 F.3d 839 (9th Cir. 1996) (applying *Timberlane*). Even courts that apply the FTAIA's "direct, substantial, and reasonably foreseeable effect" standard have been inconsistent in their application. "[C]ourts do not appear to adhere to any particular metric" when applying the test, and standards "lack uniformity and are susceptible to being manipulated to reach a desired outcome." Jordan A. Dresnick, Kimberly A. Piro & Israel J. Encinosa, *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. Miami Inter-Am. L. Rev. 453, 486 (2009). That "similar facts are capable of being interpreted quite differently under the 'same' test" reflects the test's inherent indeterminacy. *Id.* at 485.

Lanham Act. "The circuit courts have established a variety of tests" for determining whether foreign conduct has sufficient domestic effect to be actionable under the Lanham Act. *McBee v. Delica Co.*, 417 F.3d 107, 117 (1st Cir. 2005). Some courts require a showing that foreign conduct has "substantial" or "significant" effect on U.S. commerce, *see Int'l Cafe, S.A.L. v. Hard Rock Cafe Int'l (U.S.A.)*, 252 F.3d 1274. 1289 (11th Cir. 2001) (per curiam); *Atlantic Richfield Co. v. Arco Globus Int'l Co.*, 150 F.3d 189, 192 (2d Cir. 1998); *Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 250 (4th Cir. 1994), while others have explicitly disagreed, holding that "*some* effect may be sufficient." *Am. Rice, Inc. v. Arkansas Rice Growers Co-Op. Ass'n*, 701 F.2d 408, 414 n.8 (5th Cir. 1983); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428 (9th Cir. 1977). The

First Circuit has suggested a sliding scale: Where the purported infringer is not a U.S. citizen, the conduct must have a "substantial effect," *McBee*, 417 F.3d at 120, but for citizens, "a lesser showing of domestic effects" may be enough. *Id.* at 118. Further complicating the analysis, "[t]he case law has also made clear that even indirect effects may count as substantial." Comment, *The Antitrust Model of Extraterritorial Trademark Jurisdiction: Analysis and Predictions After* F. Hoffmann-La Roche, 20 Emory Int'l L. Rev. 651, 662-63 (2006).

Securities Law. "Different circuits have applied different standards in determining whether an alleged nexus to the United States is sufficient to support jurisdiction" under the securities laws. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. MDL-1446, 2005 WL 1798423, at *4 (S.D. Tex. July 26, 2005). Some courts have required a showing of "substantial adverse effect" on American investors. *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997). Others have held that the harm must not only be "substantial," but "foreseeable" too. *Mak v. Wocom Commodities Ltd.*, 112 F.3d 287, 289-90 (7th Cir. 1997). Some courts have held, without significant elaboration, that "[t]ransactions with only remote and indirect effects in the United States do not qualify as substantial." *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1045, 1051 (2d Cir. 1996). "[T]he true scope of the effects test has never been adequately defined" in this context, "and it has the potential to be extremely broad." W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application*

of the Antifraud Provisions, 74 Fordham L. Rev. 213, 222-23 (2005).

RICO. Given the degree of confusion the "effects" test has engendered in every other field, it is unsurprising that its application to RICO has created conflict. *Cf. Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663-64 (9th Cir. 2004) (looking to antitrust and securities cases to apply the "effects" test to RICO).

The D.C. Circuit concluded that petitioner's conduct overseas—privately supplying research to Brown & Williamson, founding international organizations that do not operate in the United States, App. 59a-60a—resulted in the "direct" and "foreseeable" (*id.* 59a) "dece[ption of] American consumers." *Id.* at 6a. But other courts of appeals have been far more restrained in their application of the "effects" test. In *Butte Mining PLC v. Smith*, 76 F.3d 287 (1996), by contrast, the Ninth Circuit held that the plaintiffs had not "alleged any effect" (*id.* at 290) to justify applying RICO to a fraud committed against one British and several domestic corporations, although domestically purchased U.S. assets were the subject of the fraud, two defendants were U.S. citizens, and at least one major stockholder of the defrauded corporation was American. *Id.* at 290-91. The court held RICO did not apply because the steps taken domestically were "merely preparatory," *id.* at 291, but offered no guidance for how to distinguish "preparatory" conduct from that which would justify haling foreign defendants into U.S. courts.

The application of the "effects" test is sufficiently uncertain that courts have reached diametrically opposed conclusions based on *virtually indistinguish-*

able conduct. In *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (1988), for example, the *en banc* Ninth Circuit held that the government of the Philippines could maintain a RICO action against its former president based on the effect of his domestic investment of assets fraudulently obtained abroad, because "[t]he effect on the commerce of the United States of * * * bringing stolen property into the country is palpable." *Id.* at 1358. The Fifth Circuit, however, held a Mexican corporation could not use RICO to sue its former chairman, who, like Ferdinand Marcos, was accused of "convert[ing]" his employer's assets and using them to purchase property in the United States. *Aerovias de Mexico, S.A. v. De Prevoisin*, No. 99-41162, 2000 WL 992495, at *1 (June 29, 2000) (per curiam). While acknowledging that "some of the proceeds of the allegedly fraudulent activity may have been used to procure property in the United States," the court held that effect was so "'far removed from the consummation of the fraud [that it] will not suffice to establish jurisdiction.'" *Id.* (quoting *North South Fin.*, 100 F.3d at 1051). Similarly, in *Renta*, the Eleventh Circuit held that "[i]t is clear that the effects test is not satisfied" where a foreign bank was looted by a dual Dominican and U.S. citizen, although some funds were transferred to American banks and one of the goals of the scheme "was enrichment of an American entity * * * controlled by an American defendant." 530 F.3d at 1352.[4]

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[4] It would be no answer, even if true, that the courts' different tests reflect immaterial variations with little practical effect. As the House Judiciary Committee recognized in enacting

2. The confusion that attends every application of the "effects" test reveals an important truth about its basic nature: The test is incapable of consistent or predictable application. *See, e.g.*, Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455, 1461 (2008) (noting that "courts have reached contrary results on nearly identical facts"). And because in a global economy, "everything affects everything," 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 270, at 255 (3d ed. 2006), the "effects" test "provides an almost limitless breadth" to the exercise of extraterritorial jurisdiction. Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 McGeorge L. Rev. 83, 98 (2006); *accord* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598, 611 (1990) (noting that use of the "effects" test has "resulted in a sharp rise in extraterritorial actions").

3. Inquiry into whether foreign conduct "has a 'substantial effect on United States commerce' is highly fact-dependent." Comment, 20 Emory Int'l L. Rev. at 662. Tests whose application "turn[s] on a welter of specific facts" are "inherently unpredictable" and "present powerful incentives for increased

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FTAIA despite assurances that there was "no *significant* inconsistency" in the application of the "effects" test, H.R. Rep. No. 97-686, at 5-6, *reprinted in* 1982 U.S.C.C.A.N. at 2490-91, even uncertainly in the *formulation* of the test is harmful: "Businessmen and * * * counsel cannot safely ignore the current differences in formulation." *Id.* at 6, *reprinted at* 1982 U.S.C.C.A.N. at 2491.

litigation on the jurisdictional issue itself." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (Bork, J.). As this Court recently observed, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, No. 08-1107, slip op. at 15 (Feb. 23, 2010). Even if the extraterritoriality inquiry is not jurisdictional, those concerns are squarely implicated by the "effects" test. Such fact-intensive determinations are not amenable to judgment on the pleadings, so that parties can promptly determine whether a suit will proceed, *see, e.g.*, *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998), and may require detailed discovery into a host of subjects, including myriad potential economic effects. *See Laker*, 731 F.2d at 924 (in considering effect of airlines' antitrust conspiracy, considering presence of U.S. travelers in relevant market, location aircraft were built, means of financing, and citizenship of debtholders).

Thus, foreign defendants will be subjected to the burdens of intrusive discovery, pretrial litigation, and possibly trial, even before a plaintiff's claims can be determined to be extraterritorial. In complex litigation, "the cost of pretrial discovery * * * can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak." *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.). The "danger of vexatiousness" is especially strong in RICO cases given "the presence of a treble damages provision." *Int'l Data Bank, Ltd. v.*

Zepkin, 812 F.2d 149, 153 (4th Cir. 1987) (internal quotations and citation omitted). Moreover, subjecting a company to intrusive discovery and extensive pretrial litigation may well impose burdens inconsistent with the policies of its home nation. *See North South Fin.*, 100 F.3d at 1052. This is a critical concern because the vast majority of RICO litigation is initiated not by the government, but by private plaintiffs seeking treble damages. *See generally* Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999) (noting private plaintiffs often do not "exercise the degree of self-restraint and consideration of foreign governmental sensibilities" as the government).

4. The use of such a vague and manipulable standard also deters beneficial commerce. A test as malleable as the "effects" test makes it impossible for legitimate foreign businesses "to determine in advance whether their activities are likely to subject them to [suit]" in U.S. courts. Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985). As this Court recently observed, "[s]imple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp.*, slip op. 16. The risk of protracted litigation and ruinous damage judgments deters legitimate businesses from engaging in activities that *could* subject them to suit here, "discouraging foreign investment in United States businesses" and inhibiting the flow of goods and capital. Br. of the United Kingdom at

25, *Morrison v. Nat'l Australia Bank Ltd.*, No. 08-1191. "The need for predictability suggests that a jurisdictional test should be susceptible of consistent application," Note, 98 Harv. L. Rev. at 1321, which the "effects" test plainly is not.

These are valid considerations when construing a statute used overwhelmingly for private litigation. Mindful of "the practicalities of RICO litigation," *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 153 (1987), this Court adopted a uniform statute of limitations for RICO lawsuits to "avoid intolerable 'uncertainly and time-consuming litigation.'" *Id.* at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). "The federal interests in uniformity, certainty, and the minimization of unnecessary litigation" (*Wilson*, 471 U.S. at 275) likewise strongly counsel against using the "effects" test to determine RICO's extraterritorial application.

C. A Straightforward Application Of This Court's Precedents Confirms That RICO Does Not Apply Extraterritorially

1. In determining whether Congress intended a statute to have extraterritorial application, courts "look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). Unlike many criminal statutes,[5] RICO "is silent as to any extra-

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[5] *See, e. g.*, 18 U.S.C. § 112(a), (e) (protection of internationally protected person outside U.S.); *id.* § 175(a) (biological

territorial application." *North South Fin.*, 100 F.3d at 1051. Tellingly, "Congress failed to provide any mechanisms for overseas enforcement" of RICO. *Aramco*, 499 U.S. at 256. For example, RICO's civil investigative demand provisions (*see* 18 U.S.C. § 1968) contemplate only *domestic* application, in that they can be enforced and challenged only in the "judicial district in which such person [served with a demand] resides, is found, or transacts business." *Id.* § 1968(g), (h). RICO makes no provision for service of process in a foreign country. *See* Pet. 15-16, 19 & n.7. And it is "reasonable to conclude that had Congress intended [RICO] to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures." *Aramco*, 499 U.S. at 256.

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weapon offenses outside U.S.); *id.* § 229(a), (c) (chemical weapon offenses outside U.S.); *id.* § 878(a), (d) (threats against internationally protected person outside U.S.); *id.* § 1091(a)-(c), (d)(5) (genocide outside U.S.); *id.* § 1116(c) (murder or attempted murder of internationally protected person outside U.S.); *id.* § 1201(a)(1) (kidnapping where victim transported in foreign commerce); *id.* § 1201(a)(2), (3) (kidnapping where act against victim takes place in special maritime and territorial jurisdiction or special aircraft jurisdiction of U.S.); *id.* § 1201(e) (kidnapping of "an internationally protected person" outside U.S.); *id.* § 1203(b) (hostage taking outside U.S.); *id.* § 1596 (human trafficking offenses outside U.S.); *id.* §§ 1651-53 (piracy on high seas); *id.* § 2331 (terrorist acts abroad against U.S. nationals); 49 U.S.C. § 46502(b) (aircraft piracy outside special aircraft jurisdiction of U.S.). Foreign nationals may be prosecuted for numerous federal crimes committed within the "special maritime and territorial jurisdiction of the United States," *see, e.g.*, 18 U.S.C. § 113 (assault); *id.* § 114 (maiming), which is explicitly defined to include specified areas outside the United States. *Id.* at § 7.

The absence of even rudimentary provisions to accommodate RICO's application abroad not only confirms that Congress did not intend the statute to apply extraterritorially; it also illustrates how the presumption against extraterritoriality "protect[s] against unintended clashes between our laws and those of other nations." *Aramco*, 499 U.S. at 248. Requiring Congress to speak clearly before a statute will be applied extraterritorially ensures it has given its considered judgment to implementation overseas so the statute "provid[es] just the sort of nuanced specificity and limitations" required to avoid conflict. Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 205-06 (2008). Congress must make the many difficult foreign-relations judgments necessary to implement a complex statute, *id.*, rather than having courts resolve them on an *ad hoc* basis through litigation.

2. Finally, RICO's legislative history confirms that Congress did not intended it to apply extraterritorially.[6] Congress enacted the Organized Crime Control Act of 1970 (Title IX of which was RICO) as the culmination of several years of federal investigations and congressional hearings into crime in America. A seminal document in this effort was the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* ("Report"),

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[6] This Court has repeatedly looked to legislative history in interpreting RICO. *See, e.g., Rotella v. Wood*, 528 U.S. 549, 557 (2000); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993); *H.J. Inc. v Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989).

which provided much of the factual foundation for, and the recommendations that were embodied in, the Organized Crime Control Act. *See* 115 Cong. Rec. 5877 (1969); *id.* at 9951. It is therefore telling that the report scarcely mentions areas outside the United States other than as a source for narcotics sold domestically. Report at 217, 220. The Report emphasized that two dozen "[o]rganized criminal groups are known to operate in all sections of the Nation," Report 191-92, concluding that "[o]rganized crime *in its totality* thus consists of these 24 groups allied with other racket enterprises to form a loose confederation operating in large and small cities." *Id.* at 193 (emphasis added). Floor debates on "the organized crime problem in the United States," 116 Cong. Rec. 35,295 (1970) (statement of House sponsor Rep. Poff), focused on the "enemy within." *See* 115 Cong. Rec. 5875 (statement of Sen. McClellan).

It is thus unsurprising that the Organized Crime Control Act, like other bills offered on the subject, was described as "[a]n Act relating to the control of organized crime *in the United States*." Pub. L. No. 91-452, 84 Stat. 922 (Oct. 15, 1970) (emphasis added); *see also* 116 Cong. Rec. 31,914 (1970) (H.R. 19215); *id.* at 32,347 (H.R. 19340). *See generally United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) (declining to apply a provision entitled "an act for the punishment of certain crimes against the United States" to foreign nationals on the high seas, in part because the title "furnish[es] some aid in showing what was in the mind of the legislature"). The Act made its explicit goal the elimination of "organized crime activities in the

United States." 84 Stat. 923.[7] The members emphasized that "[o]ur attack must be nationwide," 115 Cong. Rec. 10,712 (statement of Sen. sponsor, Joseph Tydings), because "[o]nly a nationally directed campaign against organized crime—including legislation such as [this]—can contain this national menace." 116 Cong. Rec. 819 (1970) (statement of Sen. Scott); *accord* 116 Cong. Rec. 35,296 (statement of Rep. Poff) (addressing organized crime is "the highest priority in the ordering of our domestic affairs"). The provisions of RICO were tailored to fit the problem. Thus, for example, Congress provided for nationwide service of process to address "the nationwide nature of the activity of organized crime." S. Rep. No. 91-617, at 161 (1969).[8]

It is striking that, in hundreds if not thousands of pages of legislative history, there is scarcely *any* reference to activity outside the United States aside from passing references to the foreign origins of narcotics, 115 Cong. Rec. 5874 (1969), and the Sicilian organizations that served as models for some American groups, 116 Cong. Rec. 18,913 (1970)—much less any reference to foreign enforcement efforts. It is difficult to escape the conclusion that if Congress

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[7] It would have been a simple matter for Congress to express a wish to address "*the effect of foreign organized crime in the United States*," *see* Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET,"* 73 Minn. L. Rev. 1023, 1077 (1989). Its failure to do so is telling.

[8] Although Congress recognizes that RICO does not provide for international service of process, *see* 134 Cong. Rec. 22,374 (1988) (statement of Rep. Conyers), efforts to amend RICO to provide for it have failed. *See, e.g.*, S.1523, 100th Cong. (1987); H.R. 2983, 100th Cong. (1987).

had intended RICO to apply extraterritorially, "there would have been at least some mention of it in the legislative history, even if not in the statute." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 490 (1985).[9]

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[9] Nor can it be maintained that the Congress that enacted RICO believed that regulation of foreign conduct with domestic effects was not "extraterritorial." The following year, the congressionally chartered National Commission on Reform of Federal Criminal Laws proposed codifying the circumstances under which there would be "extraterritorial jurisdiction" over crimes, and its proposal included offenses with such obvious domestic effects as "entry of persons or property into the United States." National Commission on Reform of Federal Criminal Laws, *Final Report: A Proposed New Federal Criminal Code* § 208(e), at 21 (1971). Tellingly, among the eight proposed categories, there was no category for foreign actions having domestic effects. *See also* The Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. § 204 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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